

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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TRANSCRIPT OF RECORD

United States Court of Appeals for the
District of Columbia

APRIL TERM, 1940

No. 7724

676

ANTONIO PARRELLA, APPELLANT,

vs.

ANTONIETTA PARRELLA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

FILED JULY 26, 1940

PRINTED AUGUST 30, 1940

United States Court of Appeals for the
District of Columbia

APRIL TERM, 1940.

No. 7724

ANTONIO PARRELLA, APPELLANT,
vs.
ANTONIETTA PARRELLA, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

A. District Court of the United States
For the District of Columbia

Equity No. 67690

ANTONIO PARRELLA, *Plaintiff*,

vs.

ANTONIETTA PARRELLA, *Defendant*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, That in the District Court of the
United States for the District of Columbia, at the
City of Washington, in said District, at the times
hereinafter mentioned, the following papers were
filed and proceedings had, in the above-entitled
cause, to wit:—

1 *Bill for Annulment of Marriage*

Filed July 22 1938

In the District Court of the United States
For the District of Columbia

Holding an Equity Court

Equity No. 67690

ANTONIO PARRELLA, 58 M St., N. W. Washington, D. C.
Plaintiff

vs.

ANTONIETTA PARRELLA, 58 New York Ave., N. W. Washing-
ton, D. C., *Defendant*.

The petition of Antonio Parrella respectfully shows this
Honorable Court as follows:

1. That he is a citizen of the United States, a resident of
the District of Columbia, and has been a resident of the

said District of Columbia for more than one year prior to the filing of this cause, and brings this suit in his own right as hereinafter set forth.

2. That the said defendant, Antonietta Parrella, is a citizen of the United States, a resident of the District of Columbia, and is being sued in her own right as hereinafter set forth.

3. That on, to wit, the 12th day of December, 1931, the said plaintiff and the said defendant, while residents of the District of Columbia, were united in holy bonds of matrimony in the City of Alexandria, in the State of Virginia, and thereafter, the said parties returned to the District of Columbia and cohabited together as husband and wife. No children have been born of this union.

2 4. That thereafter, on to wit, the 11th day of August, 1937, the said plaintiff discovered for the first time that the said defendant, at the time of the marriage to the said plaintiff, was married to one Thomas Scandone, and that the said Thomas Scandone died at Bayonne, N. J. on the 26th day of February, 1932. That the said plaintiff, at the time of the marriage to the defendant had no knowledge of the former marriage of the said defendant and that she had a living spouse at the time of said marriage to the plaintiff.

5. That upon discovering these facts, the said plaintiff asked the said defendant why she had married him while her former spouse was still living, and the said defendant replied that the said Thomas Scandone left her without cause in 1924, and that she believed that after several years of separation she was entitled to remarry without obtaining a divorce, and that she saw no reason for telling the said plaintiff of the prior marriage.

Wherefore, the premises considered, the plaintiff prays:

1. That a writ of subpoena issue from this Honorable Court, directing the said defendant, Antonietta Parrella, to appear and make answer hereto.

2. That upon the hearing of the cause, a decree may be signed herein, granting to the said plaintiff an annulment of the marriage which was consummated between the said plaintiff and the said defendant on the 12th day of December, 1931, in the City of Alexandria, Va.

3. And for such and further relief as the nature of the case may require and to the Court may seem equitable and proper.

ANTONIO PARRELLA
Plaintiff

JOSEPH A. NACRELLI
Attorney for Plaintiff

3 DISTRICT OF COLUMBIA, SS:

Antonio Parrella, being first duly sworn, deposes and says that he has read the foregoing bill of complaint by him subscribed, and knows the contents thereof; that the facts therein stated of his own personal knowledge are true, and those stated upon information and belief, he believes to be true.

ANTONIO PARRELLA

Subscribed and sworn to before me this 21st day of July, 1938.

(Seal) JOHN F. FRATANTUONO
Notary Public, D. C.

4 *Answer to Bill for Annulment of Marriage*

Filed July 30 1938

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*

*

The answer of Antonietta Parrella respectfully shows unto the court as follows:

1. The defendant admits the allegations contained in paragraph #1.

2. The defendant admits the allegations contained in paragraph #2.

3. The defendant admits the allegations contained in paragraph #3.

4. The defendant denies that she was married to one Thomas Scandone, and further denies that she had a living spouse at the time of her said marriage to this said plaintiff. On the other hand, states that she is legally married to this plaintiff, having entered into marriage ceremony with him on the twelfth day of December 1931, in the city of Alexandria in the State of Virginia.

5. The defendant denies the allegations contained in paragraph #5, and states that she was never married to Thomas Scandone.

Wherefore, the premises considered, the defendant prays:

1. That upon the hearing of this cause a decree may be signed dismissing the same.

2. That pending the final disposition of this suit the defendant be allowed alimony pendente lite, together with counsel fees and costs of this suit.

3. Upon the final termination of this case, the court require the plaintiff to pay the defendant a sum certain each month by way of permanent maintenance for the defendant.

ANTONETTA PARRELLA

5 DISTRICT OF COLUMBIA, ss:

Antonietta Parrella, being first duly sworn on oath according to law, deposes and says that she is the defendant in the above entitled case and has read the foregoing Answer by her subscribed, and knows the contents thereof; that the facts therein stated of her own personal knowledge are true and those stated upon information and belief, she believes to be true.

ANTONETTA PARRELLA

Subscribed and sworn to before me this 30th day of July, A. D., 1938.

PRICIE N. EVANS

(Seal)

Notary Public, D. C.

ALBERT A STERN

Attorney for Defendant.

6

Memorandum Opinion

Filed June 11 1940

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*

Morris, J. This is a proceeding for the annulment of marriage. The parties entered into a ceremonial marriage in the City of Alexandria, State of Virginia, on the 12th day of December, 1931, and resided from that time in the

District of Columbia as husband and wife until their separation on the 11th day of August, 1937. It is alleged that the defendant and one Thomas Scandone had previously been married, and that, although the said Thomas Scandone left the defendant without cause in the year 1924, the said Thomas Scandone remained alive until the 26th day of February, 1932, at which time he died at Bayonne, New Jersey. The plaintiff further alleges that he had no knowledge of the prior marriage of the defendant until the time of their separation.

At the hearing of this cause, the evidence showed that the defendant and Thomas Scandone did live together as husband and wife prior to 1924, but that the defendant did not know there was an impediment to her marriage with the plaintiff at the time they entered into that relationship; the lapse of time and the circumstances were such as to justify the belief that he was dead. There is no evidence to show that the plaintiff had knowledge of any impediment to his marriage with the defendant until their separation, but the evidence is strong and convincing that domestic infelicity, and not the knowledge of a living spouse at the time of their marriage, caused the husband to leave and desert the defendant.

Even though the ceremonial marriage was not valid, because the defendant at that time had a living spouse, there is no doubt that the intent of the parties was matrimonial, and not meretricious. The parties lived together as
7 husband and wife in the District of Columbia, in which jurisdiction common-law marriage is recognized. Even though there was an impediment to a valid marriage at the time of the ceremony, it would be thwarting the true objective of that legal policy to hold that, when such impediment was removed by death, and the parties continued to live together, their relation as husband and wife cannot be recognized. As stated in a memorandum opinion this date rendered in the case of *Williams v. Williams*, I am of the opinion that the Court of Appeals for the District of Columbia has given sanction to this principle in the case of *Thomas v. Murphy*, No. 7256, decided October 9, 1939, and that in so far as the case of *Tendler v. Tendler*, 56 App. D. C. 296, indicates the contrary, it has been modified. It would be futile to annul the ceremonial

marriage in this case when the plaintiff is obligated under his common-law marriage to the defendant.

A decree will be entered denying the prayers of the complaint and fixing an amount to be paid by the plaintiff to the defendant for her maintenance in accordance with the prayer in her answer.

JAS. W. MORRIS

Justice.

June 11, 1940.

8

Finding of Facts

Filed June 27 1940

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Be it remembered that as a result of the hearing of this cause for the annulment of the marriage between the plaintiff and the defendant held on the 23rd day of January, 1940, the Court found the following facts:

That the defendant, Antonietta Parrella, and one Thomas Scandone lived together as husband and wife prior to 1924, but the defendant did not know there was an impediment to her marriage to the plaintiff when they entered into the marriage status in the City of Alexandria, State of Virginia, on the 12th day of December, 1931. The lapse of time and the circumstances were such as to justify the belief that Thomas Scandone was dead. There was also no evidence to show that the plaintiff had any knowledge of any impediment to his marriage with the defendant until their separation, but the evidence was strong and convincing that domestic infelicity and not the knowledge of a living spouse at the time of their marriage caused the husband to leave and desert the defendant.

That Thomas Scandone died at Bayonne, New Jersey, on the 26th day of February, 1932, and that the plaintiff and defendant lived together in the District of Columbia, as husband and wife, after the removal of the impediment until the 11th day of August, 1937. No children were born of this union.

That even though the ceremonial marriage was not valid, the intention of the parties was matrimonial and not meretricious.

Conclusions of Law

The Court is of the opinion that since the parties lived together as husband and wife in the District of Columbia, where common law marriages are recognized, even though there was an impediment to a valid marriage at the time of the ceremony, it would be thwarting the true objective of that legal policy to hold that, when such impediment was removed by death, and the parties continued to live together, their relation as husband and wife cannot be recognized.

It is also the opinion of the Court that the United States Court of Appeals for the District of Columbia has given sanction to this principle in the case of *Thomas v. Murphy*, No. 7256, Decided October 9, 1939, and that in so far as the case of *Tendler v. Tendler*, 56 App. D. C. 296, indicates the contrary, it has been modified. Therefore, it would be futile to annul the ceremonial marriage when the plaintiff is obligated under his common law marriage to the defendant.

JAS. W. MORRIS

Justice.

Dated June 27, 1940

(In margin)

O.K. ALBERT A STERN

Atty for Deft.

10

Decree

Filed June 27 1940

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This cause having come for a hearing, and the pleadings filed and the testimony taken in open court having been considered, and it appearing to the Court that a valid common law marriage came into existence between the parties after the removal of the impediment, it is, by the Court, this 26th day of June, 1940,

Ordered, Adjudged, and Decreed, that the prayers of the complaint for the annulment of the marriage between the plaintiff and defendant be and the same are hereby denied, provided this decree shall not be effective until the expira-

tion of the time allowed for taking an appeal, nor until the final disposition of any appeal taken.

It is further Ordered, Adjudged, and Decreed, that the sum of \$30.00 monthly be paid by the plaintiff to the defendant for her maintenance, and the sum of \$165.00 be paid to her attorney, Albert Stern, as counsel fees, said sum to be paid \$50.00 forthwith upon signing of this order and balance in equal monthly installments of \$25.00 until said amount is paid in full.

JAS. W. MORRIS

Justice.

Notice of Appeal

Filed June 27 1940

* * *

11 Notice is hereby given this 26th day of June, 1940, that Antonio Parrella hereby appeals to the United States Court of Appeals for the District of Columbia from a judgment of this Court entered on the 26th day of June, 1940, in favor of Antonietta Parrella against Antonio Parrella.

JOSEPH A. NACRELLI
ALBERT LEVIN

J N

Attorneys for the plf.

Memorandum

June 27 1940

Bond (\$100) on appeal, approved and filed.

Assignment of Errors

Filed June 27 1940

* * *

The plaintiff assigns as errors committed by the trial Court in the above entitled cause the following:

1. The ruling of the Court in denying the prayers of the complaint to annul the marriage on the ground that the

defendant had a living spouse at the time of the second marriage to the plaintiff.

2. The ruling of the Court in granting maintenance to the defendant.

JOSEPH A. NACRELLI

ALBERT LEVIN

Attorneys for the plaintiff

12

Narrative Statement of Evidence

Filed June 27 1940

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Be it remembered that upon the trial of this cause the following proceedings were had and the evidence introduced and heard:

Antonio Parrella testified in substance as follows:

That he is the plaintiff in the case; that the plaintiff and defendant, while domiciled in the District of Columbia, entered into a ceremonial marriage in the City of Alexandria, State of Virginia, on the 12th day of December, 1931, and resided thereafter at 1231 North Capitol St., in the City of Washington, District of Columbia, as husband and wife until their separation on, to wit, the 11th day of August, 1937; that immediately thereafter, the plaintiff discovered that the defendant had a living spouse, one Thomas Scandone, when the plaintiff and defendant entered into the ceremonial marriage, as hereinbefore stated; that at no time prior to this discovery did the plaintiff have any knowledge that the defendant had a living spouse, and that the parties had not cohabited together thereafter; that no children were born of this marriage.

Maria Scandone testified in substance as follows:

That she is residing at Bayonne, New Jersey; that she was related to the defendant's former husband, Thomas Scandone, by blood, and that she is personally acquainted with the defendant; that in the summer of 1916, she visited the said Thomas Scandone and the said defendant while they were residing at Cherrydale, Virginia, and remained there for several weeks, and then returned to her home at

13 Bayonne, New Jersey; that in 1924, the said Thomas Scandone returned to Bayonne, New Jersey, his former home, without the defendant, and there remained until his death, which occurred on the 26th day of February, 1932; that the Thomas Scandone whom she visited at Cherrydale, Virginia, in 1916, living with the defendant as husband and wife, and the Thomas Scandone who died at Bayonne, New Jersey, were one and the same person.

Grace Codrenza testified in substance as follows:

That she was personally acquainted with the defendant and Thomas Scandone; that they were her neighbors in the Nine Hundred block of 4th St., Southwest, Washington, D. C.; that they were living together as husband and wife in that neighborhood from about 1919 to 1924, when the said Thomas Scandone left Washington, and she did not see him thereafter; that the general reputation of the defendant and Thomas Scandone in the neighborhood was that they were husband and wife.

Frank Bottazzi testified in substance as follows:

That he was personally acquainted with Thomas Scandone and the defendant; that he had a barber shop in the Nine Hundred Block of 4th St., Southwest, in Washington, D. C., during the period Thomas Scandone and the defendant were living in the neighborhood, and that their general reputation in the community was that they were husband and wife.

Antonietta Parrella testified in substance as follows:

14 That she is the defendant in the suit; that she entered into a ceremonial marriage with the plaintiff on the 12th day of December, 1931, in the City of Alexandria, State of Virginia, and that thereafter, they lived together at 1231 North Capitol St., in the City of Washington, District of Columbia, until August, 1937, when the said plaintiff ordered her out of the house; that prior to being ordered out of the house, there was domestic infelicity, because she complained to him that he was playing cards until two and three o'clock in the morning at home, keeping her awake. On cross-examination, the defendant

testified that she began to live with Thomas Scandone as husband and wife in 1906, at Cherrydale, Virginia; that a year later, a son was born of that union, and that she continued to live with the said Thomas Scandone in Virginia, and the District of Columbia until 1924, when Thomas Scandone left her, and had not heard from him since; that at no time was there a ceremonial marriage with the said Thomas Scandone, and that she did not know that the said Thomas Scandone was living at the time she married the plaintiff, but believed that he was dead.

JAS. W. MORRIS

Justice.

15

Designation of Record

Filed June 27 1940

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The Clerk of the District Court of the United States for the District of Columbia will please prepare a record on appeal in the above entitled cause, and the following papers are hereby indicated for inclusion in the record:

1. The complaint.
2. The answer.
3. Memorandum Opinion of Morris, J., denying the plaintiff's prayers for relief.
4. Decree.
5. Memo: Cost bond approved and filed.
6. Assignment of error.
7. Narrative statement of the evidence.
8. This designation.

JOSEPH A. NACRELLI
ALBERT LEVIN

Attorneys for the plaintiff

Service of a copy of the above designation of record acknowledged this 26th day of June, 1940.

ALBERT A STERN

Attorney for defendant

District Court of the United States
For the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 15, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, and in compliance with Rule 75(g) of Rules of Civil Procedure for the District Courts of the United States, in cause No. 67690, Equity, wherein Antonio Parrella is Plaintiff and Antonietta Parrella is Defendant, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 25th day of July, 1940.

C. E. STEWART,

(Seal)

Clerk.

Endorsed on cover: No. 7724. Antonio Parrella, Appellant, vs. Antonietta Parrella. United States Court of Appeals for the District of Columbia. Filed Jul 26 1940 Joseph W. Stewart, Clerk.

FILED SEP 18 1940

Joseph A. Nacrelli

CLERK

IN THE

United States Court of Appeals for the
District of Columbia

APRIL TERM, 1940.

No. 7724.

ANTONIO PARRELLA,
APPELLANT,

v.

ANTONIETTA PARRELLA,
APPELLEE.

BRIEF FOR APPELLANT.

JOSEPH A. NACRELLI,

Attorney for Appellant,
Washington, D. C.

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IN THE
**United States Court of Appeals for the
District of Columbia**

APRIL TERM, 1940.

No. 7724.

ANTONIO PARRELLA,
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v.

ANTONIETTA PARRELLA,
APPELLEE.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

The Statutory provision authorizing this appeal is Title 18, Sec. 26, of the Code of Laws for the District of Columbia.

The pleadings filed herein are: Complaint (R. 1-3), and Answer (R. 3-4). Upon the trial of the cause, the lower Court, on the 11th day of June, 1940, wrote a memorandum opinion (R. 4-6), and on the 26th day of June, 1940, signed a decree denying appellant's prayer to annul the ceremonial marriage to the appellee, and granting permanent alimony of \$30.00 per month (R. 7-8). From this decree, this appeal is taken.

Statement of Case.

Antonio Parrella, appellant, filed in the District Court of the United States for the District of Columbia a suit against Antonietta Parrella, appellee, in which suit appellant sought to annul the ceremonial marriage to the appellee (R. 1-3), alleging therein that while the appellant and appellee were domiciled in the District of Columbia, they entered into a ceremonial marriage in the City of Alexandria, Va., on the 12th day of December, 1931, and immediately returned to the District of Columbia, where they lived together as husband and wife until their separation on the 11th day of August, 1937; that the appellant then discovered, for the first time, that the appellee had a living spouse, one Thomas Scandone, when the appellant and appellee entered into the marriage status; that Thomas Scandone died at Bayonne, N. J., on the 26th day of February, 1932; that no children were born of the union between the appellant and appellee; and that they did not cohabit together since their separation.

The appellee filed an answer (R. 3-4), denying that she was ever married to Thomas Scandone, and prayed for alimony pendente lite, counsel fees, and permanent alimony upon the termination of the case.

The lower Court, upon a rule to show cause, granted alimony pendente lite in the sum of \$30.00 per month, but deferred the payment of counsel fees until the trial.

At the trial of this cause, held on the 23rd day of January, 1940, the appellant proved that he and the appellee were joined in holy bonds of matrimony on the 12th day of December, 1931 (R. 9); that Thomas Scandone and the appellee lived together as husband and wife until 1924 (R. 9-11); that Thomas Scandone died at Bayonne, N. J., on the 26th day of February, 1932

(R. 10); that no children were born of the union between the appellant and appellee (R. 9); that appellant had no knowledge that appellee had a living spouse when the appellant and appellee entered into the marriage status (R. 9); and that they have not lived together since their separation (R. 9).

The appellee, the only witness in her behalf, testified (R. 10-11) that after the marriage ceremony the appellant and appellee lived together in the City of Washington, District of Columbia until August, 1937, when the appellant ordered her out of his house, and that prior to this event there was domestic infelicity. On cross-examination the appellee testified that she began to live with Thomas Scandone in 1906, without a ceremonial marriage, but as husband and wife until 1924, when he left her without cause, and had not heard from him until the appellant informed her of that fact at the time of the separation with the appellant in 1937. That Thomas Scandone and the appellee lived at Cherrydale, Va., and in the District of Columbia, as husband and wife, and that a child was born of that union.

Questions Involved.

The questions involved are whether the annulment of the marriage is a matter of right or a matter of discretion, and whether permanent alimony can be granted in annulment suits.

Statement of Points.

The points upon which the appellant intends to rely are as follows:

1. That the lower Court erred in denying appellant's prayer to annul the ceremonial marriage to the appellee.

2. That permanent alimony can be granted only in divorce cases, and not in a suit to annul a marriage, and the lower Court erred in granting permanent alimony.

Summary of Argument.

1. *Questions relating to policy, wisdom, and expediency of the law are for the legislature and not for the Court.*

2. *A marriage void ab initio does not require the sentence, decree or judgment of the Court to restore the parties to their original rights, or to make the marriage void.*

3. *Permanent alimony cannot be granted in annulment suits.*

Argument.

1. **Questions relating to policy, wisdom, and expediency of the law are for the legislature and not for the Court.**

The lower Court is of the opinion (R. 5) that, although the ceremonial marriage was void, since the intent of the parties was matrimonial and not meretricious, by living together as husband and wife in the District of Columbia, where a common law marriage is recognized, a valid common law marriage came into existence after the removal of the impediment, citing *Thomas v. Murphy*, 71 App. D. C. 69, 107 Fed. (2d) 268, 67 Wash. Law Rep. 1026, and stating:

“It would be thwarting the true objective of that legal policy to hold that when such impediment was removed by death and the parties continued to

live together, their relation as husband and wife cannot be recognized.”

It is generally recognized that the public policy of a State is to be found in its Constitution and statutes, and only in the absence of any declaration in these instruments may it be determined from judicial decisions, *People v. Emmerson*, 302 Ill. 300, 134 N. E. 707, 21 A. L. R. 636. All questions of policy are for the determination of the legislature, *Chicago B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 31 S. Ct. 259, 55 L. Ed. 328, and not for the Courts, *Hunter v. Pittsburgh*, 207 U. S. 161, 28 S. Ct. 40, 52 L. Ed. 151. It is the duty of the Court to interpret and enforce the statutes in accordance with the intent of the legislature, unless it is in conflict with the organic law, *Worthington v. District Court*, 37 Nev. 212, 142 Pac. 230; and not even the doctrine of clean hands will prevent the annulment of a marriage, because it is subservient to the public policy of the State. *Heflinger v. Heflinger*, 136 Va. 289, 118 S. E. 316.

Congress, being the legislative body for the District of Columbia, declared the legal policy for the District when it enacted Title 14, of the D. C. Code, as amended by the Act of August 7, 1935, 49 Stat. 539, c. 453. The pertinent parts of said Title are as follows:

“Chapter 1.—MARRIAGE.

“Section 1. **Prohibitions**—The following marriages are prohibited in the District of Columbia and shall be absolutely void ab initio, without being so decreed, and their nullity shall be shown in any collateral proceedings, namely:

“Third. The marriage of any person either of whom has been previously married and whose previous marriage has not been terminated by death or a decree of divorce.

“Section 5. Marriage out of District—If any marriage declared illegal by the foregoing sections shall be entered into in another jurisdiction by persons having and retaining their domicile in the District of Columbia, such marriage shall be deemed illegal, and may be decreed to be void in said District in the same manner as if it had been celebrated therein.

“Chapter 3.—DIVORCE, ANNULMENT and MAINTENANCE.

“Section 63. Causes for divorce a vinculo and for divorce a mensa et thoro and for annulling marriages.

“ * * * Provided further, That marriage contracts may be declared void in the following cases:

“First. When such marriage was contracted while either of the parties thereto had a former wife or husband living, unless the former marriage had been lawfully dissolved.”

2. A marriage void ab initio does not require the sentence, decree or judgment of the Court to restore the parties to their original rights, or to make the marriage void.

To constitute a valid marriage, the parties must not only be willing to marry, but they must not labor under any legal disability. Therefore, the universal rule is that a person having an undivorced spouse living cannot enter into a legal marriage with another, 18 R. C. L. 412, Sec. 34. If he does, the marriage is void, and it is not necessary to be so decreed by the Court. *Patterson v. Gaines, et ux.*, 6 How. 550, 12 U. S. (L. Ed.) 553. But though no sentence of avoidance is absolutely necessary, yet for the sake of good order of society as well as for the peace of mind of the persons con-

cerned, it is expedient that the nullity of the marriage should be ascertained and declared void by a decree of the Court. Another reason why a judicial determination of such marriage ought to be sanctioned is that an opportunity should be given, when the evidence is obtainable and the parties living, to have the proof of such marriage being void presented in the form of a judicial record, so that it cannot be disputed or denied, *Powell v. Powell*, 18 Kan. 371, at page 379, 26 Am. Rep. 774; 18 R. C. L. 441, Sec. 69.

Title 14, of the D. C. Code, as amended, defines and establishes the rights of persons domiciled in the District of Columbia. The word "may," as used in Title 14, Sec. 63, of the D. C. Code, *supra*, does not empower the Court to use discretion in annulment cases, but establishes the rights of a plaintiff seeking relief. As stated by the Court in *Swenson v. Swenson*, 179 Wisc. 536, at page 542, 192 N. W. 70, in interpreting a similar provision of the State statute:

"The statute is not one conferring jurisdiction upon the court. It is one defining and establishing the rights of the parties. If a party plaintiff by sufficient proof establishes his rights to have the marriage annulled * * * and the court refuses to grant relief, the court would be just as much in error if it refused to grant a divorce under the provision of sec. 2356, * * *."

And in 38 C. J. 1349, Sec. 121 B, it states:

"Except as a statute may otherwise expressly provide, the exercise of jurisdiction of the Court in the sense of its power to grant or withhold relief in cases of nullity of marriage is not a matter of discretion but of right, except in so far as a court of chancery necessarily enjoys a reasonable latitude in the application of the established principles and precedents of equity to the particular facts in the case in hand."

The appellant established his case by proving that a valid marriage existed between the appellee and Thomas Scandone when the parties entered into the marriage status, and since the appellee did not introduce any evidence in defense, but substantiated the appellant, the lower Court should have annulled the marriage as a matter of right and should not have based the decision on public policy.

The inference that a marriage arises from continued cohabitation after the removal of the impediment does not necessarily arise in every case. Cohabitation illicit in its origin by reason of an existing impediment of marriage cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage, *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737. The fact that the appellant filed a suit to annul the marriage, and the fact that the parties have not lived together after the discovery that the appellee had a living spouse when the marriage ceremony took place at Alexandria, Va., between the appellant and appellee are sufficient to disprove a common law marriage between the parties.

The case of *Thomas v. Murphy*, *supra*, relied on by the lower Court in denying the appellant relief, is not on point with the appellant's case. That case involved an action of ejectment brought by the child born to William Murphy and one Elizabeth Dixon, and the only question involved in the case was the plaintiff's legitimacy. The plaintiff was born in 1905, begotten by Elizabeth Dixon when William Murphy was already married to another. In 1918, the wife of William Murphy obtained an absolute divorce on the ground of adultery, and thereafter William Murphy and Elizabeth Dixon continued to live together as husband and wife. It was their intention to be husband and wife after the removal of the impediment. After 1918,

William Murphy acknowledged the plaintiff as his child. This Court properly arrived at the conclusion that the plaintiff was legitimate, because it is a known fact that Courts do not look with favor on the construction of a law which declares children illegitimate, if such construction is avoidable, *Tillingham v. Tillingham*, 58 App. D. C. 107, 25 Fed. (2d) 531, 58 Wash. Law Rep. 301.

A case in which an annulment was sought, as in the appellant's case, which case the lower Court refused to follow, is *Tendler v. Tendler*, 56 App. D. C. 296, 12 Fed. (2d) 831, 54 Wash. Law Rep. 662, (certiorari denied, 273 U. S. 637, 693, 47 S. Ct. 96, 71 L. Ed. 843). The facts, briefly, are these:

One Kate Tendler filed a bill for a limited divorce on the grounds of cruelty and non support. No children were born of the union. The defendant filed a cross-bill, in which he sought the annulment of the marriage on the ground that the plaintiff had a living spouse when the marriage to the defendant took place. The plaintiff and defendant married in 1910. The plaintiff's former husband died in 1916, and after his death the plaintiff and defendant continued to live together as husband and wife until 1923.

This Court said:

"We do not find it necessary in this case to consider the general subject of common law marriages in the District of Columbia, for the reason that evidence contained in the record justifies the conclusion that there was not a lawful marriage between the parties, whether it be claimed under the statute or at common law."

3. Permanent alimony cannot be granted in annulment suits.

Title 14, Sec. 70, of the D. C. Code, reads in part as follows:

“Alimony pendente lite.—During the pendency of a suit for divorce, or a suit by the husband to declare the marriage null and void, where the nullity is denied by the wife, the court shall have the power to require the husband to pay alimony to the wife for the maintenance of herself and their minor children committed to her care, and suit money, including counsel fees, to enable her to conduct her case, * * *.”

Title 14, Sections 71, 72, and 73, of the D. C. Code, provide for the decreeing of permanent alimony in cases of divorce, but these sections have no reference to actions for annulment of marriages.

This Court said in the case of *Alexander v. Alexander*, 36 App. D. C. 78; where plaintiff sought to annul the ceremonial marriage, and annulment denied, because plaintiff did not prove his case:

“We are of the opinion that, under these provisions of the Code, the Court below was limited in its jurisdiction in the present proceeding to granting alimony pendente lite.”

Under the Federal Rules of Civil Procedure, Rule 15(b), the Court has the power to try issues not raised in the pleadings, or to permit amendments to conform to the evidence, but no evidence was introduced at the trial to enable the Court to decree alimony of \$30.00 per month. The only issue was whether the appellee had a living spouse when the appellant and appellee entered into the marriage status.

Conclusion.

It is respectfully submitted that public policy no doubt favors the marriage contract, but it will not do

to distort a plain statute in order to bring into harmony with what the Court may conceive to be sound policy. Congress established the policy for the District of Columbia when it enacted Title 14, of the D. C. Code, and the only duty of the Court is to enforce these Code provisions in accordance with the intent of Congress.

When the appellant and appellee entered into the marriage status the marriage was null and void, because the appellee was not capable of entering into the marriage status with another while she had a living spouse. The mere fact that she had not heard from him after he left her in 1924 does not alter matters. The subsequent acts of the parties show that there was not a valid marriage whether it be claimed under the statute or at common law.

Therefore, it is respectfully submitted that the decree of the Court denying the appellant relief, and granting permanent alimony to the appellee be reversed and the Cause should be remanded with direction that judgment be entered for the appellant.

Respectfully submitted,

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Washington, D. C.

IN THE
United States Court of Appeals for the
District of Columbia

UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

APRIL TERM, 1940

FILED OCT 28 1940

No. 7724.

Joseph W. Starnes

ANTONIO PARRELLA,
APPELLANT,

vs.

ANTONIETTA PARRELLA,
APPELLEE.

BRIEF SUPPORTING CONTENTIONS OF
APPELLEE.

ALBERT A. STERN,
Attorney for Appellee,
Washington, D. C.

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APPELLEE.**

Appellee respectfully submits the following:

I

That the ruling of the Court in denying the prayers of the complaint to annul the marriage on the ground that the defendant had a living spouse at the time of the second marriage, to the plaintiff, was correct.

Thomas v. Murphy, #7256 (decided October 9, 1939 by this Honorable Court) 107 Federal (2d) 268.

Goodloe v. Goodloe, #7437, (decided June 24, 1940 by this Honorable Court and not yet officially reported.)

II

That the ruling of the Court in granting maintenance to the defendant was correct.

D. C. Code, 1929, Title 14, ch. 3, §§70, 73, 75, 76.

ARGUMENT.

As, stated by the learned Justice below in his conclusions of law:

“* * * since the parties lived together as husband and wife in the District of Columbia, where common-law marriages are recognized, even though there was an impediment to a valid marriage at the time of the ceremony, it would be thwarting the true objective of that legal policy to hold that, when such impediment was removed by death, and the parties continued to live together, their relation as husband and wife cannot be recognized.”

In view of the fact that the parties hereto went through a ceremonial marriage, there is no doubt that their intent was matrimonial, rather than meretricious. It is well-settled that Courts of Equity will never presume a meretricious relationship where a matrimonial status can be spelled out of the ceremony which took place and the circumstances under which the parties subsequently cohabited.

In answer to the second proposition of the appellant, it is, further, contended by the appellee herein that,

inasmuch as the Court found that a common-law marriage existed between the parties hereto, and since such marriages are valid in the District of Columbia, it necessarily follows that the obligation to maintain and support the wife rests upon the husband, and such obligation continues throughout the entire proceedings had in the case.

It is a well-recognized principle of equity jurisprudence that an Equity Court, obtaining jurisdiction of a controversy, on any ground, or for any purpose, will retain jurisdiction for the purpose of administering complete relief, inasmuch as its primary object is to adjust *in one suit* the rights and duties of all interested parties which grow out of or are connected with the subject-matter of the suit. It would work an intolerable hardship upon a litigant to require him to determine in an auxiliary action, filed in another Court, simultaneously with the pendency of the main suit, an essential matter necessarily involved therein.

Respectfully submitted,

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